SUPREME COURT, U. S.

FILED

OCT 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-345

R. J. REYNOLDS TOBACCO COMPANY, *et al.*, *Petitioners*,

v.

AMERICAN PRESIDENT LINES, LTD., *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENT AMERICAN PRESIDENT LINES, LTD.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Two issues were presented to the Court of Appeals for the District of Columbia Circuit. (1) Whether the Federal Maritime Commission had jurisdiction under Section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, to approve the merger agreement; and (2) whether, if it had jurisdiction, its approval of the merger was lawful. The Court of Appeals held that the Commission had no jurisdiction and accordingly did not reach the merits. Reynolds' petition for a writ of certiorari is confined to the issue of jurisdiction.

Respondent American President Lines, Ltd. ("APL"), throughout this litigation has taken no posi-

tion on the jurisdiction of the Commission. This is because, while opposing this merger, APL was a party to the (unconsummated) merger as to which Commission jurisdiction was sustained in *Matson Navigation Co.* v. *Federal Maritime Commission,* 405 F.2d 796 (9th Cir. 1968).

APL has, however, been in vigorous opposition to approval of the merger on the merits. We have urged: (a) The Commission cannot without further hearing lawfully devise and approve its own merger plan, markedly different from that proposed by the parties and subjected to hearing. (b) There is not a shred of support for the basic Commission finding that United States Lines would be "dismembered" unless its merger into Reynolds were approved. (c) An administrative agency cannot rationally conclude that two wholly-owned subsidiaries of the same parent would be in independent competition each with the other.

These arguments may be open to us in this Court as an alternative ground upon which to support the judgment of the court below. *Langnes* v. *Green,* 282 U.S. 531, 536-539 (1930); *Dandridge* v. *Williams,* 397 U.S. 471, 475-476 n.6 (1970). We are, however, doubtful that we should press these arguments upon the Court.

In the first place, our argument on the merits might be considered as in support of a somewhat different judgment from that entered below. That judgment leaves a merger between Reynolds and United States Lines theoretically possible, however unlikely it might be that a merger of the two largest containership lines in the world would survive the antitrust proceeding pending in *United States* v. *Reynolds Tobacco Co.,* Civil No. 1668-70 (D.N.J., filed Dec. 15, 1970). A decision

disapproving the merger would, on the other hand, preclude even a theoretical possibility of merger.

In the second place, we much doubt that this Court in the management of its docket would wish to explore the Commission's decision on the merits but would, rather, find it appropriate to remand the case to the Court of Appeals for consideration of the merits if its decision against Commission jurisdiction were reversed. *Dandridge* v. *Williams, supra; Aetna Casualty & Surety Co.* v. *Flowers,* 330 U.S. 464, 468 (1947); *United States* v. *Ballard,* 322 U.S. 78, 88 (1944).

In these circumstances we suggest that, if the Court were to grant the petition for writ of certiorari, and if it did wish to hear argument on the merits of the Commission action, it would then be helpful if in its order granting the petition the Court were to indicate that it was prepared to receive such argument. We shall otherwise consider, under the precedent noted in the preceding paragraph, that if the Court should reverse the court below as to the Commission's jurisdiction, it would then in the normal course remand the cause to the Court of Appeals to hear our challenge to the agency decision on the merits.

Respectfully submitted,

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Dated: October 25, 1974